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No. 89-72

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AUTOMOBILE IMPORTERS OF AMERICA, INC., *et al.*,
Petitioners,

v.

STATE OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Eighth Circuit, declaring its intent to follow the lead of the Fifth Circuit rather than the Fourth Circuit, has held that the Magnuson-Moss Warranty Act and relevant Federal Trade Commission regulations do not preempt various provisions of the Minnesota motor vehicle warranty law regulating informal dispute resolution mechanisms. In their opposition, respondents largely reprise the reasoning of the Eighth Circuit, arguing that the court properly read the Act and regulations as establishing a floor above which the States are free to legislate. Br. in Opp. at 9 & 10. Although we have detailed our reasons for thinking this view incorrect, a few additional comments seem appropriate.

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* Pursuant to Supreme Court Rule 28.1, a list of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of all corporate parties appears in the appendix to the petition at Pet. App. 80a.

1. As we noted in our petition, the Eleventh Circuit has held that it is inappropriate to employ a strong presumption against the implied federal pre-emption of state law. *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989). Respondents argue, however, that, in the field of "consumer protection," such a presumption is entirely proper: state law favoring consumers must stand unless there is a "clear statement" by Congress of its intent to pre-empt.[1] We think this approach gives too little deference to national interests.

No one disputes that States play an important role in regulating the dealings between suppliers and consumers. But it hardly follows as a matter of course that varied (and often inconsistent) regulation by 50 different States will improve upon a federal regulatory scheme. If Congress or a federal agency seeks to strike a compromise between competing interests, or if those bodies choose to leave the development of standards to the private marketplace, the federal program by its nature may simply preclude any additional state regulation. *See City of New York v. Federal Communications Comm'n*, 486 U.S. 57 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986). Similarly, Congress or an agency may choose to provide options that States would prefer to foreclose. *See Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153

[1] Respondents attempt to restrict *Taylor*'s rule to cases involving implied pre-emption of state laws that *conflict* with federal law. Br. in Opp. at 10-11. But while the Eleventh Circuit had no occasion to consider whether Congress had "occupied the field" at issue there, the court articulated its holding in much broader terms than respondents admit. *See Taylor v. General Motors*, *supra*, 875 F.2d at 826. Indeed, the Eleventh Circuit drew a single distinction: between express pre-emption and implied pre-emption. *Id.* Respondents' effort to draw nicer lines among the sub-species of implied pre-emption—to discern apples and oranges where only apples exist—fails to limit *Taylor*'s scope. Respondents offer no good reason for distinguishing "field pre-emption" from "conflict pre-emption" for purposes of the "clear statement" rule that they advocate.

(1982). In such circumstances, the fact that a state law may be characterized as protecting consumers does not mean that, without a clear statement to the contrary, federal law must be presumed to give way.[2]

This case, in fact, makes apparent the difficulties that such a presumption would create. As we noted in our petition, the Magnuson-Moss Act, its legislative history, and subsequent regulations all indicate that Congress and the FTC deliberately balanced the interests of consumers, warrantors, *and states* as part of the federal scheme. *See* Petition at 12-19. Moreover, although concededly falling within the broad category of "consumer protection," this federal regulation did not interfere with any state activities: in 1975, when Congress passed the Magnuson-Moss Act, *no* State regulated warranty arbitration Mechanisms. (Indeed, no State enacted such legislation until 1982.) This is not a case, therefore, where Congress would have had special concerns about preserving a historical framework of state regulations. Rather, Minnesota simply came late to the regulation of Mechanisms and decided that it prefers its own scheme to the one envisioned by Congress.

Respondents may think it wise to incorporate a "clear statement" rule into implied federal pre-emption analysis, but the rule is not part of the familiar test that this Court presently uses. *See Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1273 (1989). In our view, such an innovation would too read-

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[2] Respondents agree with the Eighth Circuit that the Minnesota law at issue does not conflict with FTC regulations, and thus is not pre-empted impliedly by the Magnuson-Moss Act. Br. in Opp. at 12. Like the Eighth Circuit, respondents offer little to support this conclusion other than the observation that "[s]trictly speaking," a warrantor can satisfy both State and FTC by complying with Minnesota's more rigorous regulations. *Id.* But, as we have noted, a state law may conflict with the purposes of federal law even though it is physically possible to comply with both. *See* Petition at 19-24.

ily permit States to assert their own interests at the expense of national concerns.[3] But whatever the arguable merits of a "clear statement" rule, the Eighth Circuit's attempt to engraft it onto existing pre-emption analysis only heightens the need for the Court to resolve the issues presented here.

2. The federal courts that have addressed the issue have disagreed over whether the Magnuson-Moss Act and FTC regulations pre-empt state regulation of automobile warranty Mechanisms. *See* Petition at 8-9, 13-14. The Fourth Circuit has held that the Act and regulations do pre-empt; the Fifth Circuit has held that they do not, at least with regard to state-operated Mechanisms. *Compare Wolf v. Ford Motor Co*, 829 F.2d 1277 (4th Cir. 1987), *with Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985). On its way to upholding Minnesota's Lemon Law, the Eighth Circuit declined to adopt the view of the Fourth Circuit that the Act and regulations left no room for state regulation. *Wolf v. Ford Motor Co., supra*, 829 F.2d at 1279. Instead, the Eighth Circuit announced that it "agree[d] with the Fifth Circuit . . . that Congress has not fully

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[3] The presumption against implied pre-emption that underlies the "clear statement" rule would plainly hamper Congress' ability to preclude *all* government regulation—state and federal—within certain areas. This Court has recognized that a " 'federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.' " *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., supra*, 474 U.S. at 422 (emphasis in original). Up to now, this Court has exhibited a willingness to draw "the pre-emptive inference" where a comprehensive federal scheme "leaves a portion of the regulated field without controls." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1355 (1988). Under respondents' proposed rule, however, federal inaction within any portion of that regulated field would invite supplementary state regulation, absent explicit congressional pre-emption.

occupied the area of informal dispute resolution mechanisms." Pet. App. 10a.

Respondents' efforts to smooth over this conflict are unconvincing. *See* Br. in Opp. at 15-17. Their main argument is that the Fourth Circuit in *Wolf* addressed the pre-emptive effect of the Act on a state *common law* fraud action (as opposed to a state statute). Br. in Opp. at 17. But this distinction lacks substance. The familiar federal pre-emption analysis does not change depending on whether the state law at issue derives from statute or common law. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (federal Clean Water Act held to pre-empt state common law nuisance action); *Taylor v. General Motors Corp., supra*, 875 F.2d at 827 (holding that National Traffic and Motor Vehicle Safety Act pre-empts state common law products liability action); *see also Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989) (same); *Wood v. General Motors Corp.*, 865 F.2d 395, 412-13 (1st Cir. 1988) (same); *cf. Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). And the basic contradiction between the Eighth Circuit's rationale in this case and the Fourth Circuit's decision in *Wolf v. Ford Motor Co., supra*, is neither cured nor rendered academic merely because the latter considered state regulation rooted in common law rather than statute. Thus, there is a genuine conflict among the Circuits that warrants a grant of the petition in this case.[4]

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[4] Respondents also contend that their law regulating private Mechanisms is somehow akin to the state-operated Mechanisms at issue in the *Chrysler* case before the Fifth Circuit. *See* Br. in Opp. at 16. The Fifth Circuit, however, drew a clear distinction between Mechanisms established by States themselves and those established by warrantors, finding only the former not to be pre-empted. *See Chrysler Corp. v. Texas Motor Vehicle Comm'n, supra*, 755 F.2d at 1206. Minnesota regulates only the latter.

3. Respondents urge this Court to conserve its resources and deny the petition because the Second Circuit "may soon have an opportunity" to rule on the question presented here. Br. in Opp. at 18. It is true that the Second Circuit may soon have before it the decision in *Motor Vehicle Mfrs. Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988), in which a district court held that the Magnuson-Moss Act and the FTC regulations reflected a "clear intent that the federal regulations govern the mechanisms exclusively" and thus pre-empted New York regulations affecting warranty dispute Mechanisms. *Id.*, 697 F. Supp. at 736. *See* Petition at 13-14. But this hardly seems a good reason to delay resolution of the issue presented here. Whether the Second Circuit sides with the Fourth Circuit or with the Fifth and Eighth Circuits, a conflict among the Circuits will continue to exist.[5]

Respondents' proposal also ignores the cost of the delay that it advocates. It remains undisputed that the Magnuson-Moss Act sought to achieve at least some measure of national uniformity among standards governing informal Mechanisms to resolve consumer warranty disputes. The FTC deliberately tailored its regulations implementing the Act "to foster a variety of Mechanisms, including national ones . . . ." FTC Statement of Basis & Purpose, 40 Fed. Reg. 60,190, 60,209 (1975).[6] It is

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[5] Respondents maintain that this Court's ultimate resolution of the pre-emption question will "benefit [from] further discussion and analysis by the Second Circuit." Br. in Opp. at 18. Respondents do not, however, suggest that the record or prior proceedings in the case at hand are inadequate to allow this Court to resolve the pre-emption question now.

[6] Respondents argue (Br. in Opp. at 13-14) that there is no inconsistency between "encouraging" and "mandating" Mechanisms and that petitioners appear to have so indicated in the New York proceedings. What respondents miss, however, is the distinction between means and ends. There is no doubt that Congress wanted Mechanisms to become increasingly available to consumers, but, as

hardly consistent with these federal policies to perpetuate —indeed, to encourage—division among federal courts on the question whether the Magnuson-Moss Act pre-empts state regulation of warranty dispute Mechanisms.

Respondents themselves emphasize that more than forty States have enacted legislation to regulate Mechanisms since the first "Lemon Law" appeared in 1982. Br. in Opp. at 20. These statutes vary widely from State to State and almost without exception diverge from the standards established by the FTC. *See* Petition at 24-25. Warrantors attempting to operate the national Mechanisms that Congress and the FTC meant to encourage will continue to incur the costs of multiple and conflicting state regulation even while the States' authority to regulate remains at the center of a continuing conflict among federal courts. That prospect argues against further delay, not for it.

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we explained in our petition, Congress established a voluntary scheme to achieve that goal, not an involuntary one. *See* Petition at 22-23. State regulation that overrides that decision—even in quest of a similar objective—is simply inconsistent with the federal program. *See City of New York v. Federal Communications Comm'n, supra* (city cannot promulgate additional regulatory standards regarding quality of cable signals).

CONCLUSION

For the reasons stated here and in the foregoing petition, petitioners pray that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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